

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local)	
Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation)	
Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

UNITED STATES TELECOM ASSOCIATION

PETITION FOR RECONSIDERATION AND CLARIFICATION

**COMMENTS OF
MESCALERO APACHE TELECOM, INC.**

INTRODUCTION

Mescalero Apache Telecom, Inc. (“MATI”) hereby submits its Comments to the Federal Communications Commission (“FCC” or “Commission”) in response to the Petition for Reconsideration and Clarification filed by the United States Telecom Association (USTelecom) regarding the tribal government engagement obligation provisions of the Connect America Fund (*Petition*)¹, and in response to the Public Notice issued by the FCC’s Office of Native Affairs and Policy (ONAP), Wireless Telecommunications Bureau (WTB), and the Wireline Competition Bureau (WCB) requesting comments on the *Petition*.²

MATI was formed for the purpose of bringing modern communications services to the people of the Mescalero Apache Reservation. MATI serves the Mescalero Apache Reservation, an area consisting of approximately 720 square miles in south central New Mexico. MATI, as a wholly owned enterprise of the Mescalero Apache Tribe, undertook the risky venture of serving a historically underserved and economically disadvantaged area in order to afford the Mescalero Apache people with access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the tribe’s access to education, commerce, government, and public services. MATI, by taking the steps it did, also helped bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation. MATI continues its commitment to provide service to the Reservation, which now, as with the rest of the United States, must include investment in broadband capable services.

MATI opposes USTelecom’s Petition in total. The Commission’s Tribal engagement rules, as clarified and expanded by the Public Notice issued by the ONAP, WTB, and WCB that provided further guidance on the tribal government obligation provisions of the Connect America Fund,³

¹ Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 10-90, et al, filed August 20, 2012

² WC Docket No. 10-90, et al., Public Notice released August 27, 2012

³ WC Docket No. 10-90, et al., Public Notice released July 19, 2012 (*Further Guidance*)

consist of a reasonable framework under which Tribal governments and all ETCs can work in order to ensure vital communications services reach all Native Nations.

BACKGROUND

This is USTelecom's second attempt⁴ at undermining the vital decisions the FCC made in the *ICC/USF Order*⁵ that adopted a series of reasonable methods to ensure Tribal Governments are engaged in the process of safeguarding that Native Americans are afforded the availability of modern broadband services to which the rest of the world has access. In the instant case, USTelecom is also addressing, for the first time, the *Further Guidance*. However, many of the issues raised by USTelecom in its first petition are the same or similar to those raised in the instant Petition, leaving MATI to conclude that USTelecom simply does not agree that Eligible Telecommunications Carriers (ETCs) should have to communicate with Tribal Governments at all.

MATI will address several of the points made in the *Petition* below.

I. USTELECOM'S STATEMENT THAT "THE COMMISSION SHOULD RECONSIDER OR CLARIFY THAT THE TRIBAL ENGAGEMENT REQUIREMENTS DO NOT APPLY TO ETCs WHOSE SUPPORT IS BEING ELIMINATED NOR TO ETCs THAT DO NOT RECEIVE FUNDING TARGETED AT TRIBAL AREAS" IS NOT REASONABLE

A. Tribal Engagement Requirements Should Apply to All ETCs Currently Providing Service and Receiving Support

USTelecom asks the Commission to reconsider or clarify that the Tribal engagement requirements not apply to ETCs whose support is being eliminated or who receive no support targeted to Tribal areas. On the surface, this request seems legitimate – it would be unreasonable to require ETCs that do not receive support targeted to Tribal Areas to engage in

⁴ See Petition for Reconsideration of The United States Telecom Association, WC Docket 10-90, et al, filed December 29, 2011 at p. 17-19 (*1st Petition*)

⁵ Report and Order and Further Notice of Proposed Rulemaking In the Matter of Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109; and Universal Service Reform – Mobility Fund, WT Docket No. 10-208, released November 18, 2011.

⁵ See *USF/ICC Transformation Order* at Section IX. B.

communications with the Tribe about spending support that does not exist. However, the key phrase in this request is “carriers whose support is being eliminated.” USTelecom further illuminates the reader later in this section when it states “At a minimum, the Commission should reconsider or clarify that the Tribal engagement requirements – whether embodied in its rules or the *Further Guidance* – apply only to ETCs that receive new high-cost support to fund deployment on Tribal lands...”⁶ According to USTelecom, “new” support is limited to the Tribal Mobility and CAF Phase II funds. As a result, any ETC whose support is being eliminated, which would presumably include all wireless CETCs, would, under USTelecom’s view, not engage the Tribal governments unless and until the CETC is receiving support from one of the aforementioned mechanisms. This result is clearly not rational and conflicts with the FCC’s clear discussion on why the Tribal engagement provisions were necessary in the first place.

In the ICC/USF Order, the FCC states “...engagement between Tribal governments and communications providers either *currently providing* service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service.”⁷ Here the FCC is addressing the undisputed facts that 1) a “deep digital divide” exists between the Native Nations and the rest of the country; 2) “many residents of Tribal lands lack not only broadband access, but *even basic telephone service*”; and 3) there is “an essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands.”⁸ By these statements, the FCC made clear that the Tribal engagement policies adopted in the ICC/USF Order not only addressed broadband employment on a prospective basis, but also currently provided basic voice and broadband service, or the lack thereof.

Based on the FCC’s clear statements as to the current and possible future state of services on Tribal lands, and how Tribal engagement is a vital part of solving this situation successfully, USTelecom’s statement that the new Tribal engagement requirements apply only to recipients of new support, and not to those whose support is in the process of being phased out, is not a

⁶ *Petition* at 4

⁷ *ICC/USF Order* at 637 (emphasis added)

⁸ *Id.*, at 636 (emphasis added)

reasonable request. The Tribal engagement requirement must apply to all ETCs and CETCs currently receiving support, and to those who receive new support in the future.

B. The *Further Guidance* Should be Considered the Minimum Requirements for Tribal Engagement

USTelecom requests the Commission clarify that the *Further Guidance* not be considered “auditable requirements” but rather be considered mere suggestions.⁹ USTelecom offers a number of arguments in support of this request, including that any contrary finding in this regard would run afoul of the Administrative Procedures Act (APA).¹⁰ Contrary to USTelecom’s statements, MATI believes the *Further Guidance* should be considered a minimum set of requirements for Tribal engagement, and that it is up to each Tribal government as to the final ETC engagement protocol.

While it is unclear what USTelecom means by “auditable”, it is clear that the *Further Guidance* is just that, guidance. For example, “[t]his document is intended to facilitate the required discussions between the Tribal government officials and communications providers...”¹¹ and “[t]he broad goal of the guidance provided today, and future efforts to establish best practices, is to ensure the effective exchange of information...”¹² demonstrate that the ONAP, WTB, and WCB intended the *Further Guidance* as assistance for Tribal governments and ETCs in complying with the Tribal engagement rules. While the nature of the *Further Guidance* is thus clear, the facts remain that 1) the rules for Tribal engagement exist, and 2) it will up to the individual Tribal governments to decide exactly how, within the framework of the *Further Guidance*, to implement the Tribal engagement rules.

The FCC’s Tribal engagement rules present a broad framework under which the Commission envisions this vital process to take place. At a minimum, ETCs are to demonstrate on an annual basis that discussions with Tribal governments occurred that included:

- 1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions;

⁹ *Petition* at 5

¹⁰ *Ibid*

¹¹ *Further Guidance* at 1

¹² *Id* at 2

- 2) feasibility and sustainability planning;
- 3) marketing services in a culturally sensitive manner;
- 4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
- 5) compliance with Tribal business and licensing requirements¹³

These discussions are to occur under the auspices of planning, deployment, and provision of services on Tribal lands. Contrary to statements made by USTelecom¹⁴ and others¹⁵, the Tribal engagement requirement is fully supported by the record.¹⁶ The *Further Guidance* simply expanded on this rule and offered Tribal governments and ETCs certain minimum guidance on how to comply with the FCC's Tribal engagement requirements. MATI believes the *Further Guidance*, by virtue of it being related to FCC rules, should be taken a step further and be considered minimum requirements for Tribal engagement, and that the Tribal governments, as being the sovereign government on Tribal lands, determine the final framework under which engagement with ETCs serving Tribal lands will function.

II. USTELECOM'S STATEMENT THAT "THE COMMISSION SHOULD RECONSIDER THE FURTHER GUIDANCE TO THE EXTENT IT IMPOSES SUBSTANTIVE OBLIGATIONS ON ETC'S BECAUSE IT WAS ADOPTED WITHOUT NOTICE AND COMMENT IN VIOLATION OF THE APA" IS MISLEADING AND SHOULD BE REJECTED

One of the main themes of USTelecom's *Petition* is that the *Further Guidance* was adopted without input from interested parties. This argument is plainly in error and should be ignored by the Commission. First and foremost, the Commission, in adopting its Tribal engagement rules, clearly stated its expectation that the "ONAP, in coordination with the WTB and WCB, would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary."¹⁷ Second, as argued above, the *Further Guidance* is clearly meant to be a set of minimum guidelines propagated to assist ETCs and Tribal governments in complying with the Commission's Tribal engagement rules which, in MATI's view, then become the minimum

¹³ 47 CFR 54.313(a)(9)

¹⁴ *1st Petition* at 18

¹⁵ See *Petition for Reconsideration of the Rural Incumbent Local Exchange Carriers Serving Tribal Lands* at 2

¹⁶ See e.g., *Opposition and Comments of the Gila River Indian Community and Gila River Telecommunications, Inc.*, filed February 9, 2012 (comments on USTelecom's *1st Petition*) at 4-8; *ICC/USF Order*, footnote 1049

¹⁷ *ICC/USF Order* at 637

criteria by which ETCs can meet the rules, depending on the Tribal government's final determination.

Furthermore, USTelecom and others impacted by the Commission's finding that Tribal areas, in many cases, are chronically underserved, and thus a set of Tribal engagement rules need to be adopted, were fully aware of this issue in other proceedings. For example, the Commission clearly stated that changes were necessary in the area of Tribal government engagement by ETCs in the proceeding initiated to investigate improving communications services for Native Nations:

"...we seek comment on whether additional requirements should be imposed on carriers seeking ETC designation on Tribal lands. For example, is it sufficient for carriers seeking designation, either from the Commission or the state, to file a proposed plan to serve with the Native Nation government upon filing an ETC petition, as recommended in the National Broadband Plan? Should carriers also be required to engage with the Native Nation in advance of any such filing?"¹⁸

"...we seek comment on the nature of consultation with Native Nation governments that should be included in the ETC designation process... For example, what aspects of the jurisdictional analysis, service offering and advertising of supported services, public interest analysis, designated service area, and regulatory oversight requirements should be included in the consultation process?"¹⁹

Comments were filed in this proceeding on the above questions, which indeed appears to be a consideration of the Commission in adopting the Tribal engagement rules.²⁰ As a result, neither USTelecom nor any other party can properly claim that the Tribal engagement rules or *Further Guidance* are not supported by the record.

A. Obligation to Engage with Tribal Governments

The Mescalero Apache Tribe is a sovereign tribal governmental entity. The government of the United States, including the FCC, has repeatedly recognized that federal regulation must recognize and accommodate the role and rights of sovereign tribal governments.²¹ Given this

¹⁸ *In the Matter of Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry (rel. March 4, 2011) at 30

¹⁹ *Id.*, at 31

²⁰ See e.g., Comments of Alexicon at 5-7 and Comments of the National Tribal Telecommunications Alliance and Gila River Telecommunications, Inc. (filed August 4, 2011) in CG Docket No. 11-41

²¹ *Executive Order No. 13175*, 65 *Fed Reg* 67249, November 9, 2009, "Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have

clear precedence, including the United States government as well as the FCC's own language that engagement with Tribal governments is necessary, USTelecom's claims should be rejected in totality.

CONCLUSION

It is clear that USTelecom is wrong in claiming the *Further Guidance*, and the Tribal engagement rules upon which such guidance is based, was adopted without public input or was in any other way promulgated improperly. Furthermore, although the *Further Guidance* was issued as a compliance aide for the Commission's Tribal engagement rules, MATI stresses that in actuality, the provisions adopted by the ONAP, WTB, and WCB should serve as minimum requirements for all ETCs, regardless of the future status of their support receipts. It will then be up to the Tribal governments to decide whether additional procedures will be required in order for all ETCs to demonstrate compliance with the Commission's Tribal engagement rules.

The Commission should deny the *Petition* and reaffirm its commitment to ensuring residents in Native Nations receive the same communications services as available to the rest of the United States.

Respectfully Submitted,

Godfrey Enjady, General Manager
Mescalero Apache Telecom, Inc.

September 26, 2012

tribal implications"; *Presidential Memorandum, Tribal Consultation*, 74 Fed Reg 57881, November 9, 2009, "...executive departments and agencies...are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian Tribes"